

IN THE HIGH COURT, SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A222/2014

In the appeal between:

MPHO TUKULA

Appellant

and

DIE STAAT

Respondent

CORAM: JORDAAN, J *et* MBHELE, AJ

JUDGEMENT: MBHELE, AJ

HEARD ON: 4 MAY 2015

DELIVERED ON: 18 JUNE 2015

- [1] On 03 October 2011 the Appellant, who was legally represented, appeared before the Regional Court sitting at Bloemfontein, and was convicted of theft, robbery with aggravating circumstances and attempted murder. For the purpose of sentence, all charges were taken as one and the appellant was sentenced to 15 years imprisonment.
- [2] He feels aggrieved by both the convictions and sentence and now approaches this court on appeal against the same after leave to appeal was granted by the trial court.

- [3] On convicting the Appellant, the trial court rejected the Appellant's version as not reasonably and possibly true. The court below, further accepted that the appellant was correctly identified as one of the robbers on the date in question. The trial court, furthermore, accepted the medical evidence that confirmed that Gafur was stabbed several times and sustained injuries. Furthermore, the trial Court accepted that the first complainant's cell phone was taken and the 2nd complainant was robbed and injured.
- [4] In the notice of appeal and heads of argument as well as submissions before us, the Appellant assails convictions on the grounds that the trial court erred in finding that the witness's identification of the Appellant, was reliable.
- [5] Ms. Kruger, appearing for the Appellant, further, submits that the evidence tendered by the state was marred with a lot of contradictions which called for total rejection thereof, by the trial court.
- [6] The State supports both the convictions and the sentence according to Mr Mohlala, who contends that the Appellant was correctly identified by the state witnesses as one of the assailants on the date in question. He further argued that the evidence of identification tendered by the state was reliable, and that the witness corroborated each other on the identity of the attacker.
- [7] The factual dispute between the parties, which fell to be determined by the trial court, was whether or not the Appellant was one of the robbers. The State's version, as presented by the

state witnesses was that Kgaritse Nkolonyane (First Complainant), Abul Gafur (Second Complainant) and Anoon Ali were together in a bakkie driven by the 1st complainant. Just when they were about to drive out of the second complainant's shop they were approached by the Appellant and two other unknown males. They came towards them and one of them had a firearm in his hand. The Appellant was armed with a knife. They opened the passenger door of the bakkie and grabbed the second complainant by his neck.

- [8] Ali and the first Complainant ran out. The appellant, after taking out the second complainant out of the vehicle ran to the other side of the vehicle and sat on the driver's seat. It is at that time that the first Complainant ran back to the car and removed the car keys. The Appellant further removed the first complainant's cell phone from the vehicle. The appellant and the other two male persons, in his company further took money from the second complainant.
- [9] The second complainant knows appellant as a regular customer at his shop. The robbers took about R12 000.00 from the second complainant as well as his cell phone. The accused stays in the vicinity of his shop and when he approached them on that morning he was face to face with him. Gafur was not certain of how many people attacked them on the said date.
- [10] The accused simply denies that he was involved in the robbery. Ms Kruger contended that the state failed to prove the Appellant's identity beyond reasonable doubt. She further contended that there were material contradictions in the evidence tendered by the

state which called for total rejection thereof. The Appellant admitted that he was a regular customer at the second complainant's shop and that at all times he went to the shop, he was assisted by the second complainant. He further corroborated the second complainant when he said that the Appellant was at the shop earlier in the day, before the robbery took place. It is not in dispute that the Appellant is well known to the second complainant.

- [11] It is trite that factual findings of the trial court are presumed to be correct unless they are shown to be wrong, with reference to recorded evidence. The acceptance by trial Court of oral evidence and conclusion thereon are presumed to be correct, absent misdirections. I have no doubt that the trial court correctly found that the Appellant was indeed one of the robbers.
- [12] The second complainant's prior knowledge of the Appellant made it easy for him to identify him. Our courts have repeatedly stated that the evidence of identification must be approached with caution. Such witness must not only be honest but must be reliable. The reliability of the witness's observation depends on various factors such as lighting visibility and eyesight; (see **S v Mthetwa** 1972 (3) SA 766 (A) 768 A-C; and **S v Sithole and others** 1999 (1) SASV 585 (W) at 591.
- [12] In the current case, the witnesses had ample opportunity to observe the Appellant. The Appellant was well known to the second complainant.

- [13] The appellant feels that there has been unlawful splitting of charges or duplication of convictions. It was argued on behalf of the Appellant that the several stab wounds inflicted on the second complainant were enough to force him into submission. It was further argued that state did not prove that the appellant had the intention to murder the second complainant.
- [14] It was argued on behalf of the Respondent that the number of stab wounds inflicted on the delicate body parts of the complainant are an indication that the Appellant had the intention to kill the complainant. It was further argued that the appellant saw a possibility of the second complainant being fatally injured and reconciled himself thereto.
- [15] It is my view that the force used by the Appellant was excessive for the purposes of bringing appellant under submission. The appellant and his companions were armed with a knife and a gun which by mere producing of such objects would have been sufficient to bring the complainant under submission. The force used was excessive. In the circumstances I am of the view that the trial court was correct in convicting the Appellant of both robbery and attempted murder.
- [16] Sentencing is pre- eminently in the discretion of the trial court. The sentences can only be interfered with if the sentencing court exercised its discretion unreasonably or in circumstances where sentences are adversely disproportionate. (See **S v Pieters** 1987 (3) SA 717 at 727).

- [17] The crime of robbery with aggravating circumstances justifies a sentence of 15 years imprisonment. The Appellant, in addition to robbery with aggravating circumstances, was found guilty of attempted murder and theft. In the instant matter the victim suffered several injuries and had to be detained in hospital for 3 days.
- [18] When weighing up the mitigating factors against the aggravating Circumstances, this matter as well as the interests of the community, I am not persuaded that the sentence imposed is unjust. I am of the view that the trial court showed mercy on the Appellant as it could have justifiably imposed a more heavier sentence than the one imposed. The fact that the appellant spent more than a year in custody awaiting trial, does not automatically entitle him to a lesser sentence. There is no justifiable cause for us to interfere with the sentence.

ORDER

- [19] I make the following order:

The appeal fails on all three counts and the convictions and sentence are confirmed.

A. MBHELE, AJ

I concur.

A. F. JORDAAN, J

On behalf of the appellant: Me Kruger
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. Mohlala
Instructed by:
Director: Public Prosecutions
BLOEMFONTEIN